PETITION NOT PRINTED

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 44

BILLY FERGUSON,

Appellant,

vs.

THE STATE OF GEORGIA

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

APPELLANT'S BRIEF ON THE MERITS

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CITATIONS

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Opinion Below

The opinion of the Supreme Court of Georgia (R. 73) is reported in 215 Ga. 117.

Jurisdiction

The judgment of the Supreme Court of Georgia was entered on May 8, 1959 (R. 78). A timely petition for rehearing filed on May 18, 1959 (R. 81), was denied on June 5, 1959 (R. 82). The jurisdiction of the Court is invoked under 28 U.S.C. 1257 (2) (since the validity of a State Statute on grounds of repugnancy to the Constitution of the United States is drawn in question).

Questions Presented

Whether the appellant received a fair and impartial trial, and whether his constitutional rights were violated before, during, and after his trial under these facts:

1. The defendant, a nineteen year old boy was arrested without a warrant on July 17, 1958, he was lodged in jail and questioned by at least five or six police officers. He was held in custody without being taken before any committing magistrate from July 17, 1958, until September 15, 1958, in violation of Georgia Code Section 27-212 (Acts of 1956). During which time the defendant, a young boy of low mentality, was coerced into making a confession. And while the accused was advised that he did not have to make a confession, he was not advised of his constitutional right to have counsel.

2. At his trial, unknown to the defendant or his counsel, there were two jurymen related to the State Prosecutor. And, a third juryman was related to the Sheriff that had custody of the defendant.

3. During the trial the defendant took the witness stand in his defense but he was denied his constitutional right of having the "guiding hand of counsel at every step in the proceeding against him."

4. Upon appeal of defendant's conviction to the Supreme Court of the State of Georgia, it was discovered by the defendant's attorney that the trial court clerk failed to include in the record sent up to the Supreme Court of Georgia, important parts of such record in support of defendant's contention that he was not given a fair and impartial trial. Under Georgia Law, Code Section 6-810 (4), the Supreme Court of Georgia is required to have sent

up any additional parts of the record that have been omitted.

A reading of the record will show that the Supreme Court of Georgia, and the Clerk of the lower court dilly-dallied around about the record, but it was never sent up for the Supreme Court of Georgia to fully and fairly adjudicate the questions at issue. Thereby denying the defendant equal protection of the law by denying him the same right that the Supreme Court gave to others in 196 Georgia 114, and cases therein cited.

Statutes Involved

Section 27-212, Georgia Criminal Code, Acts 1956, pp. 796-797.

> "In every case of an arrest without a warrant the person arresting shall without delay convey the offender before the most convenient officer authorized to receive an affidavit and issue a warrant. No such imprisonment shall be legal beyond a reasonable time allowed for this purpose and any person who is not conveyed before such officer within 48 hours shall be released."

Section 38-415, Georgia Code on Evidence.

> "In all criminal trials, the prisoner shall have the right to make to the court and jury such statements in the case as he may deem proper in his defense. It shall not be under oath, and shall have such force only as the jury may think right to give it. They may believe it in preference to the sworn testimony in the case. The prisoner shall not be compelled to answer any questions on cross-examination, should he think proper to decline to answer."

Section 6-810, Georgia Code on Pleading and Practice. —(4)

"If, however, it appears to the appellate court, from the argument of the counsel on the hearing, or in the consideration of the same preparatory to making up the judgment of the Court, that any part or portion of the record of the case in the court below has not been brought up, and such part of the record is necessary, in the opinion of the Court, to be before them in order to fully and fairly adjudicate the questions at issue and the alleged errors, then the Court shall, by its order directed to the clerk of the court below, require him to certify and send up such portions of the record as, in the opinion of the appellate court, are needful or necessary in order to fully and fairly adjudicate the errors assigned."

Statement

On September 24, 1958, the appellant was found guilty on a bill of indictment charging him with the offense of murder (R. 4), in violation of Georgia Criminal Code Section 26-1002. He was sentenced to death by electrocution (R. 70). A motion for a new trial was filed October 10, 1958 (R. 6, 7, 8, 9, 10, 11, 12, 13, 14). The trial court denied the motion for a new trial February 3, 1959 (R. 15-16). The case was appealed to the Supreme Court of Georgia, which court affirmed the lower court on May 8, 1959 (R. 78). A motion for rehearing was filed May 18, 1959 (R. 79-81). The motion for rehearing was denied by the Supreme Court of Georgia June 5, 1959 (R. 82). Notice of appeal to the Supreme Court of the United States was filed August 29, 1959 (R. 82). The order of the Supreme Court of the United States noting probable jurisdiction was entered February 29, 1960 (R. 85).

Summary of Argument

I. We contend this appellant was denied a fair and impartial trial and his constitutional rights were violated before, during, and after his trial.

For the Supreme Court of Georgia to interpret and construe Section 38-415 of the Code of Georgia to mean that a defendant in a criminal case can be cross-examined, if he consents, by the prosecutor, but has no right to have his own counsel ask him any questions or assist him in any way while the defendant is making his statement to the jury, unless the trial judge in his discretion permits it, is in direct violation of both the due process clause and the equal protection clause of the Constitution.

II. The appellant, while being illegally detained in violation of Georgia Code Section 27-212, was mentally coerced into making a confession by a group of police officers, who questioned him continuously for approximately seven hours. During this time, he was forced to take a paraffin test. He was never told of his constitutional right to have counsel.

III. Unknown to appellant and his counsel, until after the trial, relatives of the prosecuting attorney and the sheriff were members of the trial jury. Also unknown to appellant or his attorney, some jurors were biased and prejudiced against the appellant and thereby deprived him of a fair and impartial trial.

IV. Appellant was denied equal protection of the law by the Supreme Court of Georgia by refusing to compel the trial court to send up missing parts of the record in violation of Georgia Code Section 6-810 (4), in order to fully and fairly adjudicate the questions in issue.

Argument

I.

In our American Jurisprudence, a citizen accused of crime has a basic fundamental right to have the benefit of counsel during all stages of the prosecution and trial. A state statute, a decision of a court, or a practice or custom which denies such a right and privilege is forbidden under our Federal Constitution. Likewise, such an interpretation of a statute is repugnant to said constitutional provisions.

It is submitted therefore, that the interpretation of Code Section 38-415, by the Supreme Court of Georgia, *supra*, to mean that the defendant cannot be asked any questions by his attorney (R. 8) is unconstitutional.

Code Section 38-415 or its predecessors appear to have been the law in Georgia since 1868, at which time it applied only to felony cases, but it was later extended to all criminal cases. The constitutional validity of this Code Section was never attacked until the case of *Corbin* v. *The State*, 212 Ga. 231 (7a), wherein the Supreme Court of Georgia held: "During the trial the defendant made no sufficient attack on the constitutionality of our statute, or any part thereof which gives the defendant the right to make a statement to the court and jury in his behalf." Therefore, a certiorari was denied by this court in 351 U.S. 987.

The most important period in the trial of any criminal case is when defendant is on the stand. It can take or save his life in capital cases, and in others, it can take or save his liberty or property. If he is guaranteed "the right to have the assistance of counsel in his defense" by the Constitution and is guaranteed by the State Constitution the benefit of counsel, by what reason is he denied assistance and benefit of counsel at the most crucial point of his

trial? Such construction and application of section is absurd and violates both State and Federal Constitutions. Under such construction, when a defendant goes on the stand to make his statement, all assistance and benefit of counsel disappears from the case till he comes off the stand as completely as if his attorney was out of town.

It is submitted the Georgia Courts are wrong in the above construction and application of this Code Section (38-415) which says: "*The prisoner shall not be compelled to answer any questions on cross-examination, should he think proper to decline to answer.*" This Code Section does not say *direct examination,* therefore, it does not prohibit defendant's answering any questions asked him by his own attorney. Where and by what right do the Georgia Courts get the notion and decide that the defendant's counsel cannot ask defendant any questions (R. 8)? Such is not the law and such construction is prohibited by the law itself. Such an interpretation flies in the face of common sense—when section is correctly construed.

The paramount consideration in statutory construction is the effectuation of the intent of the legislature. Is it not logical that had the legislature intended that the defendant could not be asked questions by his own attorney that they would have used the words "direct examination"? Is it not also logical that the only reference in this Code Section as to being asked questions distinctly and only refers to "cross-examination"? This is only natural as the legislature did not by any means ever intend to deprive the defendant of his State and Federal Constitutional right of benefit of counsel.

Let us now proceed a step further regarding this Code Section. The Supreme Court of Georgia (R. 75b) says: "It has been repeatedly held by this Court that counsel for the accused cannot, as a matter of right, ask the accused

questions or make suggestions to him when he is making his statement to the court and jury." However, in *Corbin* v. *State*, 212 Ga. 231 (7), it was held that while the defendant's counsel has no right to ask him any questions, "the trial judge, in his discretion, can permit his counsel to ask him questions. In *Echols* v. *The State*, 109 Ga. 508, 512, it was said " . . . his counsel has no right to ask him questions. Doubtless the court might, at the prisoner's request, permit questions to be put to him, as a matter of discretion. Doubtless this discretion will, on all proper occasions, be exercised favorably to the accused." We submit to interpret this Code Section to mean it is discretionary with the trial judge as to whether or not the accused shall have the benefit and assistance of counsel would be discriminatory and would therefore deny to some defendants the equal protection of the law that would be given to others.

In *Missouri* v. *Lewis*, 101 U.S. 22-25, it was said: "Equal protection of the laws means no person shall be denied the same protection of the laws which is enjoyed by other persons in the same place and under like circumstances." In *Griffin* v. *People, State of Ill.*, 351 U.S. 12, it was said: "Constitutional guarantees of this clause and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons . . . Both equal protection and this clause emphasize the central aim of judicial system that all people charged with crime must stand on an equality before the bar of justice."

In *Harrison* v. *The State of Georgia*, 83 Ga. 129, on page 136 it was said regarding this Code Section (38-415) "There is no obscurity or ambiguity in the statute. The legislature has made the matter as clear as can the judiciary. Why should not the legislature be left to address the jury in its own language?" Why should the presiding

judge have the discretion to go beyond its terms? Though Code Section 38-415 appears to be fair on its face and impartial in appearance, yet if it is applied and administrated as the Georgia courts have been and are doing by making unjust and illegal discriminations between persons in similar circumstances, thereby denying equal justice, we submit would be violative of the equal protection clause of the Fourteenth Amendment.

For the Supreme Court of Georgia to deny defendant the benefit of counsel at any stage of his trial, or to hold that it is discretionary with the trial judge, is tantamount to a denial of due process of law. *Auto-Rite Supply Co.* v. *Mayor*, 124 A2d 612.

In *Powell* v. *State of Alabama*, 287 U.S. 45, Mr. Justice Sutherland said, " . . . he (defendant) requires the guiding hand of counsel at *every stage in the proceeding against him* . . . " (Emphasis supplied.)

It is submitted that this Code Section properly construed means the defendant can make such statement as he wishes. He shall not be sworn. He may be asked questions like a witness, but he cannot be compelled to answer any questions on cross-examination if he declines to do so. This would give him assistance and benefit of counsel while on the stand when it is needed most to counteract stage fright and paralysis of speech. It is our contention that Georgia Code Section 38-415 as construed by the Georgia Supreme Court is invalid.

II.

This appellant was arrested without a warrant and was not taken before a committing magistrate in violation of Georgia law, Code Section 27-212 (Acts 1956), he was held in jail from the day of his arrest July 17, 1958 (R. 11), until the day of his trial September 23, 1958. During all

that time he was never taken before a committing magistrate for a preliminary hearing to be informed of his rights as to what he was charged with, and that he had a right to counsel. Appellant's counsel, on September 4, 1958, filed a Writ of Habeas Corpus setting forth these facts; however, the trial judge did not set it down for a hearing until 2:30 p.m. on September 15, 1958, a few minutes before the scheduled hearing on the Writ, the Grand Jury indicted the appellant on a charge of murder. The trial judge then issued a bench warrant for his arrest, although he had been and still was incarcerated for about two months. The judge then dismissed the Writ stating "it is now moot because I just issued a warrant."

Code Section 27-212, *supra*, states: ". . . the person arresting shall without delay convey the offender before a committing officer . . . No such imprisonment shall be legal beyond a reasonable time for this purpose and any person who is not conveyed before such officer within 48 hours shall be released."

It is contended therefore, that to arrest and hold this appellant in jail for nearly two months in direct violation of the Georgia law made this an illegal arrest and detention. While thus being illegally held, this appellant, a nineteen year old boy of low mentality, was questioned for about seven hours and was forced to take a paraffin test by a group of policemen, deputy sheriffs, and Georgia Bureau of Investigation officers, all of whom refused to take this boy before a committing magistrate, under Georgia law, in order to inform him of his right of having counsel, etc. And, after this prolonged questioning a confession was obtained (R. 9, 10, 11). It will be noted that the said confession states: "I have been advised of my rights that I do not have to make a statement . . . " (R. 9). However, it does not say he was advised of his right to have counsel. In *Sullivan* v. *D. C. Utah*, 126 F. Supp. 564, it was stated:

"Due process clause of this amendment protects criminal defendants in State Courts in their right to assistance of counsel, and this right contemplates not only right to counsel in trial, but also at every stage of the proceedings, at least in capital cases where death sentence has been imposed."

This court held in *Payne* v. *State*, 353 U.S. 929: "The use in a state criminal trial of a defendant's confession obtained by coercion, whether physical or mental, is forbidden by this clause" (Due process of law). See also *Tarrence* v. *Buchanan*, 126 F. Supp. 752; *Alvarez* v. *Murphy*, 246 F.2d 871; *Turner* v. *Penn.*, 338 U.S. 62; *Watts* v. *Indiana*, 338 U.S. 49; *Ashcraft* v. *Tenn.*, 322 U.S. 143; *Chambers* v. *Florida*, 309 U.S. 227.

III.

The trial judge in his order overruling the motion for a new trial (R. 15) says, "the court finds as a matter of fact, from affidavits of the twelve jurors sworn to try said case, submitted in behalf of the State of Georgia that the question, 'are you related to the solicitor, or to anyone in his office or anyone around the table' was not in fact and in truth asked of the said jurors *individually* or collectively while said jurors were being examined . . ."

This can mean only one thing, that the Honorable trial judge did not read all of the twelve affidavits because each and every juror swore in his affidavit that he was asked by counsel for defendant, how well he knew the solicitor and the sheriff. The affidavit of one juror states that he was asked by counsel for the defense if he was related by blood or marriage to anyone at the prosecution table. Another juror swore that he did not remember for sure.

Douglasville, Georgia, where this trial was held, is a small town of about three thousand population, and defense

counsel realizing it would be difficult to find an unbiased jury, asked each prospective juryman if he was related to the State prosecutor and also asked them how well they knew him.

We submit that even if the only question asked them was how well they knew the solicitor, all twelve jurors admitted in their affidavits that it was asked of them, then is it not logical to assume that the relatives of the State prosecutor should have said that they were in fact related to him?

The Georgia Supreme Court in their decision (R. 76a) says in effect that in a *criminal case* it is all right if the jurors are related to the solicitor who prosecutes the case because he is acting in an official capacity of the court, and is not such a party interested in the result of the case.

It certainly cannot be said that a jury composed of relatives of the prosecuting attorney, who is doing everything in his power to convict, would be unbiased, nor can such a juror be considered an impartial juror in the sense of that term as used in the constitutional provision which guarantees an impartial trial.

The affidavits of the defendant (R. 14) and his counsel (R. 12-13) show that the relationship was unknown to them until after the trial. The solicitor who prosecuted this case has stipulated that two members of the jury were in fact related to him, and one other was related to the sheriff of the county.

The record also shows (R. 12-13) that there was evidence of prejudice on the part of the jury, but the trial judge did nothing about it. As was said by this Court in *Murchison*, 349 U.S. 133, "A fair trial in a fair tribunal is a basic requirement of due process, and requires an absence of actual bias in trial of cases." See also *Massey* v. *Moore*, 348 U.S. 105.

IV.

When this case was appealed to the Supreme Court of Georgia, affidavits and depositions were left out of the record sent up by the lower court. These missing parts of the record had to do with the relationship of jurors to the solicitor, as well as bias and prejudice. It is well to note that the trial judge in his order overruling the motion for a new trial (R. 15-16), refers to no other grounds of the amended motion for a new trial (R. 7, 8, 9, 10, 11, 12, 13, 14, 15) except grounds four and five to which the missing parts referred. It is also to be noted in the order of the judge overruling the motion for a new trial (R. 15), that he states, "further evidence (affidavits) and argument has been duly and timely presented . . . "

The Supreme Court of Georgia in their opinion (R. 76b) held that because the missing parts had not been sent up in reference to grounds four and five, they had no way of determining whether or not the trial judge abused his discretion in overruling these grounds for a new trial.

The appellant in his motion for rehearing (R. 79, 80, 81) (3), requested the Supreme Court of Georgia to order the missing affidavits sent up under the authority given by Georgia Code Section 6-810 (4) and this Code Section was held in *Northwest Atlanta Bank* v. *Zec*, 196 Ga. 114-118, by Chief Justice Duckworth to mean " . . . this court is *required*, under subsection 4, to order certified and send up copies of such record as appear to be necessary in order to *fully and fairly adjudicate* the questions at issue and alleged errors." (Emphasis supplied.)

In response to this request, the Supreme Court of Georgia instead of ordering the missing *affidavits and depositions*, directed the trial court to send up "a properly certified copy of the *approved brief of evidence* . . . if the same be of

file. If it be not of file, let the said clerk certify to that fact" (R. 72). (Emphasis supplied.)

The clerk of the lower court did what he was ordered (R. 72), and informed the Supreme Court that he had the missing parts on file, but no *approved brief of evidence*.

We would like for this court to notice that the Supreme Court of Georgia *did not* order up what was requested of them, instead they asked for an approved brief of evidence and then in their order denying the motion for a rehearing (R. 77-78) stated (R. 78): " . . . or that it, the depositions, or counter-showing by the State have been *approved by the judge so as to become a part of the record which could be transmitted by the clerk to this court and they cannot now, since certification of the bill of exceptions, be made a part of the record.*" (Emphasis supplied.)

In a recent decision of the Supreme Court of Georgia, *McCrary* v. *The State*, 215 Ga. 887, and in which case this counsel was also attorney of record, the Supreme Court of Georgia, without request of counsel, issued the following order to the trial court: "It is ordered that the clerk of the Superior Court of Fulton County transmit to this Court, without delay, a properly certified copy of the state's traverse to motion to withdraw the plea of guilty." It was sent up and considered as part of the record. And, when counsel in his motion for a rehearing in the *McCrary* v. *The State* case, *supra*, informed the Supreme Court of Georgia, that neither McCrary nor his counsel had ever been served with a copy of the traverse, and that the defendant did not specify such traverse in his bill of exceptions that had been certified and approved by the trial judge, the court in its decision stated: "This court, in an *abundance of precaution to assure the full protection of the legal rights of the movant*, desired to know whether the solicitor had made any admission favorable to the movant, and ordered

the clerk of the trial court to transmit the state's traverse to this court, under the ample authority to order such a record given by Code 6-810 (4)." (Emphasis supplied.)

We submit therefore, that the Supreme Court of Georgia, the highest court of the state, denied to the appellant in the instant case the right to have the missing affidavits sent up on the ground that they could not now, since certification of the bill of exceptions, be made a part of the record. However, this right was granted the state in the case of *McCrary* v. *The State, supra.*

We contend that the Supreme Court of Georgia did not give this appellant an abundance of precaution to assure the full protection of the legal rights due him, by not ordering up the missing parts requested of them (R. 80-81) (par. 3), as was given the defendant in the case of *McCrary* v. *The State.* A reading of the trial judge's order denying the motion for a new trial (R. 15) clearly shows that the said missing parts of the record had been "duly and timely presented" to him before January 1959, and the bill of exceptions that was approved by the trial judge (R. 3) on February 25, 1959, clearly states in Paragraphs two and three (R. 2) "and all entries and orders thereon." It was therefore unnecessary for the Supreme Court of Georgia to add the word "approved" to its order (R. 72).

We contend, in all due respect to the Supreme Court of Georgia, that because they did not have the missing affidavits sent up, either by mistake or by oversight, or for any other reason whatever, they did nevertheless deny this appellant the absolute legal right that he has, under Georgia law, Code Section 6-810 (4) to have *any* missing parts sent up from the trial court so that the Supreme Court of Georgia would have the missing parts before them in order to fully and fairly adjudicate the questions at issue.

We also contend that the Supreme Court of Georgia denied this appellant the equal protection of the law that was given to others in *Northwest Atlanta Bank* v. *Zec*, 196 Ga. 114-118, and cases therein cited. Also *McCrary* v. *State*, 215 Ga. 887.

Conclusion

For the reasons above stated, this appellant has been denied his constitutional rights of a fair, impartial, and legal trial before, during, and after his trial.

It is the duty of our courts to see that every person tried for a crime be given a completely fair and impartial trial and to see that none of his constitutional rights are violated or denied. To do otherwise would reduce the judicial process to sham, and the fundamental aspects of fairness result in a miscarriage of justice.

It is therefore respectfully submitted that the judgment of the court below should be reversed.

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